

# VOPA ADVISOR

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## MISSION OF VOPA

*Through zealous and effective advocacy and legal representation to:*

- ◇ *Protect and advance the legal, human, and civil rights of persons with disabilities;*
- ◇ *Combat and prevent abuse, neglect and discrimination;*
- ◇ *Promote independence, choice and self-determination by persons with disabilities in the Commonwealth.*

## MESSAGE FROM THE VOPA BOARD CHAIR

Barbara Barrett

As we begin a new year, we do it with renewed hopes and expectations in our personal lives and of those around us. None of us know for sure what the future holds for us or what things we can count on. The one thing, I hope we all know, is we are not alone in this world and our presence does make a difference. Are you just taking up space or are you trying to make the world a better place to be? The one thing I hope everyone can count on is one another to “care” what that difference is. Your P&A is making a difference in the lives of people with disabilities in Virginia.

If you did not know before reading it here, Heidi Lawyer, our Acting Director of VOPA, has accepted the position of Executive Director for the Virginia Board for People with Disabilities effective February 7, 2003. On a personal level, as someone who has first-hand knowledge and experience working with Heidi, I feel it is a

“victory” for persons with disabilities because she will continue to serve as part of the “conscience” and guardian of the “integrity” of the system in Virginia in another agency. There have been a few people whom I have met in my lifetime as a disability advocate who I will always cherish and be thankful that our life paths crossed. Heidi Lawyer is one of them.

As the Board Chair of the newly formed P&A, I feel a great loss for our agency, but I want to publicly acknowledge what an excellent job she did for DRVD and, the past months, for VOPA. Her professional expertise, knowledge and leadership have earned her statewide respect and admiration in the disability community. We all look forward to continuing to work with her in her new role and wish her the best.

I thought we (you too,

probably) would be welcoming a new director for VOPA by now. But just like well laid plans, this one has not gone as smoothly as hoped. Interviews are being held, and we hope to be closer to the hiring (if not done) by the time you read this. Our only excuse for the delay is the desire to be very careful in our process and to make a choice that will be the best we can make. With the move of Heidi, the need to hire a director seems more urgent than before.

The VOPA staff continues to do the work of the P&A in an outstanding fashion and is looking forward to having the director in place to balance the “load” and help define the new agency.

Effective February 4, 2003, Jonathan Martinis will serve as the Acting Director for VOPA.

### SPREADING THE VOPA MESSAGE

Paul J. Buckley and Dana W. Traynham, Staff Attorneys

VOPA attorneys Dana Traynham and Paul Buckley were presenters at a continuing education course attended by over 200 mental health professionals. The seminar, titled "Virginia Mental Health and the Law 2002," was a continuing education course approved by the Association of Social Work Boards, American Psychological Association, National Board for Certified Counselors, American Nurses Credentialing Centers Commission on Accreditation, American Health Information Management Association and Commission for Case Management Certification.

The training, which took place at the Richmond Marriott West on December 6, 2002 (the day after the early winter storm hit), was well attended despite the weather. The staff of the sponsoring organization is based out of Eau Claire, Wisconsin, and consequently was probably quite amused by the local reaction to what must be a very routine occurrence for them.

The portion of the day-long program presented by Dana and Paul

was titled, "Treatment Rights." The presentation, as the title implies, focused on an individual's legal rights with regard to mental health care including informed consent, the right to refuse treatment, psychotropic medication issues, treatment of minors without parental consent, and special considerations of criminal defendants. An overview of VOPA programs with an emphasis on PAIMI was, of course, included.

The questions from the participants revealed some level of confusion regarding the circumstances under which medication may be administered over objection. The treatment of minors is also obviously an area of uncertainty. A surprisingly large number of the participants indicated that they are engaged in the care and treatment of criminal defendants and had many questions and concerns with respect to medication over objection and restoration of competency.

Dana and Paul hope to take their show on the road.

### "OFFICE HOURS" PROGRAM WITH CENTERS FOR INDEPENDENT LIVING

William Tucker, Staff Attorney

The Protection and Advocacy of Individual Rights (PAIR) Program has started its "Office Hours" program in order to provide better service to persons with disabilities in all parts of the Commonwealth. The program is a collaborative effort between VOPA and several of Virginia's Centers for Independent Living (CILs). Under the program, PAIR staff attorneys will be available at a participating CIL one day each month to meet with consumers who have disability-related legal issues. Through the program, VOPA staff



attorneys will also provide other services to the CILs, such as presentations and group training sessions for staff and consumers.

To find out more about the "Office Hours" program, contact your local CIL, or contact VOPA staff attorney Bill Tucker at (804) 225-3218.

### VOPA ENSURES ACCESS TO STATE CAPITOL

Jonathan Martinis, Managing Attorney

Through discussions with several entities, including the Capitol Police, the Virginia Department of General Services (DGS), and the Office of Lieutenant Governor Tim Kaine, VOPA has ensured that persons with disabilities will have an accessible entrance to the State Capitol building.

For years, persons with disabilities were free to use the West entrance of the Capitol as an accessible entrance. This year, however, people were greeted, at this entrance, by a sign indicating that it was for the

sole use of legislators. As a result, persons with disabilities who need an accessible entrance were left with no way to enter the Capitol building.

Upon realizing that persons with disabilities were, by this new policy, excluded from the Capitol, VOPA Board member, Maureen Hollowell, and VOPA staff toured the site, spoke with Capitol Police, and contacted the Office of Lieutenant Governor Kaine, informing them that the new policy unlawfully denied access to persons with

disabilities. VOPA later contacted DGS, informing them of the exclusion and formally requesting that a new sign be posted at the West entrance stating that it was available to be used by persons with disabilities. All parties contacted by VOPA were courteous and cooperative, and pledged to correct the situation.

As a result, within 24 hours after VOPA became aware of the problem, a new sign was posted at the West entrance, guaranteeing access to persons with disabilities.

## **HILL V. DEPARTMENT OF CORRECTIONS**

**Jonathan Martinis, Managing Attorney**

The Circuit Court for the City of Richmond denied the defendants' Motion to Dismiss the lawsuit (Demurrer), holding that the defendants did not have sovereign immunity and that the case is not moot.

VOPA filed suit on behalf of a former inmate of the Department of Corrections (DOC), Otis Hill. Mr. Hill, who is deaf, was denied access to the DOC "Life Skills" course, which teaches inmates skills that they will need after they are released. The DOC considers the course to be so important that it requires all inmates take and complete it prior to being released. However, when Mr. Hill requested that the DOC provide him with a sign language interpreter so that he would be able to understand, take part in, and benefit from the course, the DOC refused to do so and instead "waived" the requirement that he complete it. After

Mr. Hill was released from incarceration, VOPA filed suit alleging that the DOC and other defendants (the Director of the DOC and the Secretary of Public Safety) had violated the Virginians with Disabilities Act which requires state agencies and personnel to ensure that persons with disabilities can take part in and benefit from their programs—and Code of Virginia §2.2-3401—which requires state agencies to provide sign language interpreters for persons who need them to take part in their programs. The suits asked the Court to enjoin the defendants to provide Mr. Hill with the course, in a location convenient for him, and a sign language interpreter, at no cost to him, so that he could take part in and benefit from it.

In response to the suit, the defendants filed a Demurrer asking that the Court dismiss the case on the grounds that they are immune from

suit and that, since Mr. Hill was no longer an inmate, the case was moot. VOPA opposed the Demurrer, arguing that the defendants do not have sovereign immunity from the state laws and that Mr. Hill was, and continued to be, injured by the defendants' refusal to provide him with the course; the case was not moot.

After hearing oral argument from both sides, the Court held: (1) the defendants are not immune from suit under the state laws (the first time, to VOPA's knowledge, any Court has so held); and (2) that the case was not moot. (The first time, to VOPA's knowledge, that a suit for an injunction filed on behalf of a former inmate for discrimination that occurred while he was an inmate has been held to be not moot.)

Since the Court's ruling, the parties have recommenced settlement negotiations.

## **TRANSITION TRAINING** **Hilary Malawer, Staff Attorney**

VOPA's PABSS (Protection and Advocacy for Beneficiaries of Social Security) Program will focus on training parents, consumers, and educators on transition issues in the upcoming year. As young adults with disabilities move from school to work, there are numerous issues that arise. One important issue is how work will affect social security benefits (SSI and SSDI). Many parents, consumers, and educators believe in myths such as: "If you are on disability benefits, you better not work or you will lose everything."

The PABSS staff attorney will travel across the state for five- "Listening Tour" sessions to train

parents, educators, and consumers on applicable social security topics, as well as special education transition law. Each session will be in collaboration with a benefits planning assistance and outreach specialist (BPAO). BPAOs are entities that specialize in informing consumers about precisely what will happen to their benefits (SSI and SSDI) and health care coverage (Medicaid and Medicare) if they go to work. Often the fear of not knowing what will happen to one's health care precludes individuals with disabilities

from the work force. Within the Tour sessions, we will train on specific work incentives that allow working individuals with disabilities to maintain health care coverage.

In addition to training on special education and social security law, we want to find out from parents, educators, and consumers what their transition needs are so that we can be responsive to these needs.



## VOPA FILES SUIT IN CUPP V. PULASKI

Jonathan Martinis, Managing Attorney

VOPA has filed suit, on behalf of a person with disabilities, against the Town of Pulaski and several Town officials. At issue is a Town ordinance and the Town's interpretation of a State statute which, if permitted to stand, will deny the plaintiff and other persons with disabilities the ability to travel freely in the Town.

The Plaintiff is Harold Cupp, who has several disabilities that require him to use a mobility scooter. Because many of the public roads in Pulaski do not have sidewalks, Mr. Cupp, like all other pedestrians, must travel in the roads where there are no sidewalks. On two occasions, however, Mr. Cupp was threatened with prosecution by Town of Pulaski police officers, who alleged that Mr. Cupp, by using his mo-

bility scooter in the roadway, violated a Town ordinance which prohibits, "The use, riding and/or operation of...devices on wheels or runners, except bicycles, mopeds and motorcycles, on any portion of any street of the town," and a State statute which, they argued, bars persons from using wheelchairs in public roadways even when there are no sidewalks.

Initially, VOPA sought a settlement with the defendants, asking them to agree not to prosecute Mr. Cupp for traveling in the streets when there are no sidewalks, something that all other pedestrians can do (and, in fact, have a legal right to do under Virginia law). After these negotiations failed, VOPA filed suit, alleging: (1) the Town ordinance is unconstitutional, because it pro-

hibits Mr. Cupp from being able to travel freely, denies him other constitutional rights, and conflicts with State and Federal laws; (2) the State statute does not prohibit the use of wheelchairs in the street when there are no sidewalks; (3) if the State statute does prohibit the use of wheelchairs in the street, then it is unconstitutional; and (4) if the Town ordinance and State statute are constitutional and prohibit Mr. Cupp from using his mobility scooter in the street where there are no sidewalks, then the Town should be enjoined to install sidewalks along the streets that do not have them.

The case is pending.

## VOPA WORKING TO PROVIDE ACCESSIBLE PARKING IN DOWNTOWN FREDERICKSBURG

William Tucker, Staff Attorney

VOPA is working with the City of Fredericksburg to provide accessible parking in the City's downtown district. Like many of Virginia's historic cities, downtown Fredericksburg presents unique problems toward providing accessible parking due to the geography of the area, the lack of sufficient parking spaces, and the remote location of downtown parking lots. VOPA staff attorneys have met with City officials and the Director of the disAbility Resource Center, which is the Fredericksburg Center for Independent Living, and have agreed that the City will adopt a plan that will allow for greater accessibility than the Americans with Disabilities Act and its regu-

lations currently require.

VOPA is also seeking that the plan incorporate Right-of-Way guidelines that were recently adopted by the Access Board, but



have not yet been adopted by the Department of Justice and do not

yet have the force of law.

VOPA attorneys will meet with City officials again in mid-February after the City provides its initial plan. The PAIR Program hopes to use the final plan developed by the City of Fredericksburg as a model for other cities in the Commonwealth of Virginia to provide accessible parking and to prepare for the Right-of-Way guidelines to become law.

If you know of other cities in Virginia that do not provide adequate accessible parking, please contact the VOPA Consumer Services Division at 1-800-552-3962.



## AFTER NINE YEARS, COMMUNITY INTEGRATION

### Jonathan Martinis, Managing Attorney

VOPA successfully represented a person who was held in a state facility for nine years after he was found not guilty of a misdemeanor by reason of insanity.

VOPA's client was arrested and accused of committing a misdemeanor. Had he been convicted of the crime, he could have been sentenced to a maximum term of incarceration of one year, and likely would have not been sentenced to serve any time. Nevertheless, his attorney recommended that he plead not guilty by reason of insanity telling him, according to VOPA's client, that he would probably have to serve six months in a state facility. Nine years after being acquitted, he remained in forensic custody with little hope of ever being discharged.

In 2002, the Virginia General Assembly amended the *Code of Virginia*, §19.2-185. The new law

states that persons acquitted of misdemeanors by reason of insanity may not be held in forensic custody for more than one year after their acquittal. His new attorney advocated for his discharge to the community. His treatment team developed an appropriate discharge plan, which called for him to be discharged to a community setting with appropriate supports and services. The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) then petitioned the Court to request that he be released pursuant to the plan.

However, less than one week before the hearing on the Department's petition, the Commonwealth's Attorney stated that he would oppose the discharge. At that point, VOPA became aware of the case. The next day VOPA entered the case as co-counsel and

filed a Motion and Memorandum of Law supporting the petition for discharge and argued that the Commonwealth's Attorney had no standing to oppose the discharge, as *Code of Virginia*, §19.2-185 stated that the patient could not be held in forensic custody for more than one year.

The matter proceeded to a hearing where the Commonwealth's Attorney argued that VOPA's client was not entitled to release and that the new statute did not apply to him. VOPA argued that our client, after serving nine years in forensic custody, had a legal entitlement, pursuant to the new statute, to discharge. The Court agreed with VOPA.

Our client was discharged, and is now living successfully in the community.

## MOST CHILDREN NOT LEFT BEHIND

### Philip Markert, Staff Attorney

Much publicity (and controversy) has been generated by implementation of the Federal education initiative called "No Child Left Behind" (NCLB). Although the name sounds new and dramatic, the legislation which created this program is actually a reenactment (or renewal) of a much older program known as Title I. Title I was designed to target extra financial assistance toward schools with disproportionate numbers of financially, needy children. This focus was based on the observation that schools in poor neighborhoods frequently have less resources and poorer performance than schools in wealthier neighborhoods.

Of course, many observers have also noted that significant proportions of children from all neighborhoods have not completed high school. Even more troubling to many has been the reality that many students that do complete school still have not mastered the "three Rs" – the basic skills of reading, (w)riting, and (a)rithmetic necessary to function in our society. Consequently, the standards-based reform movement was launched.

In Virginia, the standards-based program we are more familiar with is the Standards of Learning (SOL). Virginia was one of the earliest states to get on board in this effort, starting with the Literacy Passport Program implemented

many years ago. Today, the program has evolved into the much feared SOL. In many ways, the **new** NCLB simply adds more teeth to the **old** standards-based reform movement.

What is the link between Title I and NCLB? Money. States that accept Title I funds (and all do) must implement programs to hold their schools accountable for results. Schools that do not demonstrate sufficient improvement in their graduation rates risk increasing direction and control from the state level, and are required to implement some remedial actions to improve their performance.

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## THE ROAD TO APPROPRIATE MENTAL HEALTH TREATMENT IS A TWO-WAY STREET

Dana Traynham, Staff Attorney

When VOPA's Protection and Advocacy for Individuals with Mental Illness (PAIMI) staff advocate for appropriate mental health services for their clients, the focus is usually on community-based services, often for individuals who are currently receiving services in an in-patient setting. For example, during this last quarter, VOPA opened a case for John (not his real name)



at Northern Virginia Mental Health Institute (NVMHI) in Falls Church. John had been deemed psychiatrically stable and ready for discharge to a community program. The Community Services Board (CSB) had identified an appropriate placement for John and had completed a series of steps to prepare him for discharge, including several visits to the community facility. Everything was set for his discharge from NVMHI and admission to the community program except for the final step — a comprehensive physical examination. Upon reviewing routine lab work and subsequent follow-up tests, doctors discovered that John had cancer. Suddenly, the plans for discharge came to a screeching halt, and his transition into the community program was temporarily suspended pending further testing and review. Further complicating the case was the fact that John had adamantly refused further testing and any future treatment. This is where VOPA stepped in.

I received a phone call from a concerned staff member at NVMHI who questioned the actions of the CSB. With permission from John's legally authorized representative, I got involved in the case. I attended a meeting with staff from NVMHI and the CSB to discuss John's situation. The CSB staff stated that John's medical needs exceeded the services available at their program, and his refusal to submit to the medical tests and treatment recommended by his physicians made him ineligible for their services. I advocated for his right to refuse treatment given the fact that he had not been deemed legally incompetent to make such decisions and there was no guardian assigned to his case. Furthermore, medical evidence presented at the meeting by John's treating physician clearly indicated that John's medical needs were no more bur-

densome than those of any other individual with mental illness, and this fact would continue to hold true regardless of his decision regarding further testing and treatment.

NVMHI staff raised the possibility of seeking appointment of a guardian to provide permission for testing and evaluation, but the CSB staff indicated that even if he accepted treatment, he

may not be allowed to enter their program. Their rationale was that if he accepted treatment, he would require more staff support than they could offer. In a nutshell, John's placement was in jeopardy whether or not he chose to receive treatment for his disease and, thus, he was being denied services based solely on the diagnosis of cancer.

Staff at NVMHI are to be commended on the support they pledged to John even after discharge. They countered every argument made by the CSB staff by offering to provide individualized support. For example, when the CSB states that their staff may not be able to provide transportation to all of his appointments, NVMHI agreed to provide transportation for 3 months through its outreach services. When the CSB said they may not be able to find a doctor in the community to follow John's care, his doctor at NVMHI agreed to follow his case even after discharge.

With the issues left unresolved after the meeting and with the threat of losing John's placement in a community — where such opportunities are rare — VOPA initiated steps to file a complaint in circuit court claiming violation of the Americans with Disabilities Act, the Virginians with Disabilities Act, and the Rehabilitation Act of 1973. Subsequent communication with the executive director of the CSB led to an agreement that John would be served in the community, and he quickly transitioned to the community program. John also agreed to proceed with treatment.

John's case is an example of successful advocacy for getting people out of the hospital and for receiving appropriate treatment in the community. But what about people who are working to get the level of care available in an in-patient setting? Is effective advocacy

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## THE ROAD TO APPROPRIATE MENTAL HEALTH *Con't. from Page 6*

a two-way street leading from the hospital to the community and, also, from the community to the hospital? I was faced with this question in two recent cases involving parents seeking appropriate care for their children, one a minor and the other a young adult. In each case, the individual with mental illness had been through a long series of very short hospitalizations with premature discharges followed by escalating dangerous behavior. In each case, the individual had caused serious physical injuries to either himself or family members.

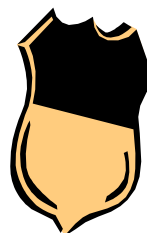
I advocated for more comprehensive treatment to include longer term comprehensive care. In both situations, the individual did in fact receive long-term care, and such care continues at the time of this report. Appropriate treatment does include an array of services including inpatient and community-based programs, and effective advocacy for appropriate treatment must navigate a two-way street.

## VOPA SETTLES WITH NORFOLK POLICE DEPARTMENT Shannon Manning, Staff Attorney

VOPA has reached a settlement agreement with the Norfolk Police Department in a case involving a Norfolk police officer who stopped a woman with a vision impairment from entering a local restaurant with her service animal.

The Norfolk Police Department has agreed to force-wide training of all the City's police officers. Shannon Manning, VOPA Staff Attorney, will conduct the initial training on service animal laws. The training module will include all federal and state laws regarding service animals. Officers will learn how to respond to incidents involving service animals and what responsibilities they have in these situations. All future officers will receive the same training.

This new program should ensure that Norfolk is a friendly and comfortable City for users of service animals.



## MOST CHILDREN *Con't. from Page 5*

So far, I have not mentioned the term disability. That is because the program is not targeted at **children with disabilities**; it is targeted at **schools with poor performance**. Anything that helps improve our schools in general should, hopefully, also help our kids with disabilities. One of the key features of NCLB is that if initial improvement efforts at failing schools prove unsuccessful, then the schools are required to offer their children supplemental education services and, in some circumstances, the option to change schools.

Many articles in the disability press have described these features as benefits that will automatically be available to children

with disabilities. After all, supplemental services does sound like related services and supplemental education sounds like special education. Hidden in the fine print of the law, however, (the old Title I) requires that these services be targeted at the high poverty rated schools and children. In fact, when there are insufficient funds to serve everyone, the law requires states to ration their NCLB funding on the financially needy.

This is probably a good thing. There is certainly a significant correlation between economic need and disability, if for no other reason than lack of employment opportunities and increased medical costs. However, not **all** children with disabilities have entitlement to the resources created by NCLB. Like most things in life, it pays to read the fine print. Nonetheless,

NCLB does require that children with disabilities be included in the assessment process. Even if an Individualized Education Program (IEP) or 504 plan exempts a child from passing an SOL, in most cases, the test must still be taken so that the progress of these children can be measured and compared with others. In this case, the new law may indeed help ensure that no child with a disability is left behind.

## VOPA HELPS INCARCERATED CONSUMER WITH MENTAL ILLNESS

Michael Gray, Staff Attorney

AB is a young man with serious depressive and anxiety-based illnesses. AB's family reports that he is a particularly vulnerable individual because he frequently suffers from suicidal ideations when in crisis, and he has been hospitalized at least three times in recent years.

Despite his condition, AB was living successfully in the community before his recent arrest and incarceration in a rural county jail. Prior to his incarceration, AB was stabilized on medications provided by a local CSB clinic. AB's family also provided him support in the form of medication dispensing, compliance, and monitoring services.



AB's medications were brought with him when he was processed into the jail. However, the physician's assistant (PA) who examined AB during the intake process refused to dispense AB's regular medications as prescribed. The PA abruptly discontinued AB's medications and put AB on a small dose of Valium. The jail doctor signed the order without examining AB.

Within a few days, AB began to destabilize. Family members became concerned and attempted to persuade the jail administrators to put AB back on his medications. When these efforts were rebuffed, the family called the PAIMI attorney

for help.

The PAIMI attorney went to the jail, interviewed AB, obtained a records release from him, and then took the matter up with the jail administration. The administration was very resistant, refusing to release any records without a court order, and declining either to re-visit their PA's decision, or to obtain any expedited psychiatric care for him.

The PAIMI attorney issued a formal demand that the requested records be provided to me within 24 hours, and I started gathering evidence to resolve the situation. The jail's attorney subsequently telephoned and, after some initial resistance, agreed to produce the requested records by overnight mail, which he did.

AB's medical records, combined with information from other sources, made it apparent that the PA's decision had been based on erroneous information and assumptions. The PAIMI attorney used this information to persuade a CSB psychiatrist to conduct an emergency mental health evaluation of AB that night, and to force the jail to – both – submit to that evaluation and transport AB to the clinic. Within hours, AB was back on his medications.

After the weekend, a member of AB's family called the PAIMI attorney and informed him that the jail was properly dispensing AB's scheduled medication and that his condition had improved substantially. But, the family member

also reported that AB had told her that jail staff had required him to sign an agreement under which he would be sent to "the hole" if he requested his P.R.N. medication.

The PAIMI attorney immediately issued a formal request for the written notice and related records, policies and other documents and also demanded that AB be given his P.R.N. The jail responded by producing the requested items and immediately withdrawing the condition it had attempted to place on AB's use of his P.R.N. AB now reports that he is receiving all of his medications unconditionally and as prescribed.

The PAIMI attorney and AB are currently discussing legal options for solidifying the gains made in this case and applying them on a systemic level. Based on the experiences of this case, this jail may be a good candidate for a general awareness raising on disability rights and legal requirements. Depending on the ultimate conclusion of the present case, the awareness raising might be best pursued by a general investigation, a required training program, or both.





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**VOPA**

Virginia's Protection and  
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